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Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

October Term, 1998

OLIN T.C. DAWSON,

Petitioner,

v.

LOUISIANA STATE UNIVERSITY, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Fifth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the appeal court erred in concluding that there were no genuine issues of material fact regarding whether LSU discriminated against him on the basis of race when it discharged him sufficient to grant a summary judgment.

2. Whether in an employment discrimination suit the court should review the Appeal Court's failure to review the District Court Judge's ruling impermissibly narrowing the scope of discovery, contrary to the established law of *McDonnell Douglas v. Green*, and its progeny, when plaintiff timely filed objection and opposition to the District Judge's ruling into the record.

3. Whether the plaintiff, Olin Dawson is entitled to Due Process as guaranteed by the Fourteenth Amendment of the U.S. Constitution, when defendants' employment policy accords plaintiff the right to due process and thus created a property interest in continued employment.

LIST OF PARTIES

The parties to the proceeding below were:

Olin T.C. Dawson, Petitioner

Louisiana State University Agricultural and Mechanical College

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

STATEMENT OF THE CASE 1

I. Factual Background 1

II. Lower Court Proceedings 3

REASON FOR GRANTING WRIT 4

I. The District Court Erred In Granting Summary Judgment 4

II. Whether Appeal Court Erred In Failing To Review Or Address The District Court Judge's Order Reversing The Decision Of The Magistrate Judge, When Plaintiff Timely Filed Objection And Opposition To The District Judge's Ruling, In The Appeals Court's Ruling That This Issue Was "Not Properly Before The Court" 22

III. The Plaintiff Was Entitled To Due Process, As Guaranteed By The 14th Amendment Of The U.S. Constitution, When The Defendants By The Language In Their Employment Policy Accorded Plaintiff Due Process Thus Creating A Property Interest In Continued Employment .....

CONCLUSION 30

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Abrams v. Lightolier, Inc., 50 F.3d 1204 (3rd Cir. 1995) 27

Berry v. Board of Supervisors of L.S.U., 715 F.2d 971 (5th Cir. 1983) 11, 13

Blanchard v. Stone Safety Corp., 935 F.2d 18 (2nd Cir. 1991) 20, 21

Board of Regents v. Roth, 408 U.S. 564 (1972) 28

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 21

Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1988) 28, 29

Colazo v. Condado Plaza Hotel, 441 F.Supp. 16 (DC Puerto Rico 1996) 7, 8

Duchan v. Cajon Co., 791 F.2d 43 (6th Cir. 1986) 20, 22

Estes v. Dick Smith Ford, Inc., 856 F.2d 1097 (8th Cir. 1988) 25

Furnco Const. Corp. v. Water, 438 U.S. 567 (1978) 27

Hall v. Dow Corning Corp., 114 F.3d 73 (5th Cir. 1997) 21

Hawkins v. Hennepin Technical Center, 900 F.2d 153 (8th Cir. 1990) 25

Hill v. Seaboard Coastline, R.R., 885 F.2d 804 (1989) 13

Hotel & Restaurant Employees Union Local 25 v. Atty. Gen. U.S. 804, F.2d 1256 (App. DC 1986) 27

Jones v. Birdsong, 679 F.2d 24 (5th Cir. 1982) 25

TABLE OF AUTHORITIES – Continued

Page

Josey v. John R. Hollingworth, 996 F.2d 632 (C.A. 3 Pa. 1993) 8

Julif v. Andel Corp., 73 F.2d 79 (3rd Cir. 1989) 14

Kreiger v. Gold Bond Building Products, 863 F.2d 1091 (2nd Cir. 1988) 20

McDonnell Douglas v. Green, 411 U.S. 722 (1973) 5, 23, 25

Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986) 17

Miller v. Fairchild Industries, 876 F.2d 718 (9th Cir. 1989) 14

Monroe v. Burlington Industries, 784 F.2d 568 (4th Cir. 1986) 20, 21

Norris v. Hartmarx, 913 F.2d 253 (5th Cir. 1990) 20, 21

Page v. DeLaune, 837 F.2d 233 (5th Cir. 1988) 21

Randle v. City of Aurora, 69 F.3d 441 (10th Cir. 1995) 19

Rhodes v. Guiberson Oil Tools, 75 F.3rd 989 (5th Cir. 1996) 5

Singletary v. B.R.X., Inc., 828 F.2d 1135 (5th Cir. 1987) 23

Sorba v. Pennsylvania Drilling Co., 821 F.2d 200 (3rd Cir. 1987) 23

Walther v. Lone Star Gas Co., 952 F.2d 119 (5th Cir. 1992) 13

Washington v. Brown & Williamson Tobacco Corp., 756 F.Supp. 1547 (M.D. Ga. 1991) 22, 27

TABLE OF AUTHORITIES – Continued

Page

Williams v. Giant Eagle Markets, 883 F.2d 1184 (3rd Cir. 1989) 19

Wyatt v. Kaplan, 686 F.2d 276 (5th Cir. 1982) 25

STATUTES

42 U.S.C. Section 2000e 5

Federal Rule of Civil Procedure 56(b)(c)(e) 4, 5, 7

First Amendment U.S. Constitution 19

Fourteenth Amendment U.S. Constitution 14, 20, 28

U.S. District Court Middle District Local Rule 74.1 .. 23, 25

OPINIONS BELOW

The initial opinion of the Fifth Circuit in this matter was unpublished, but is cited as and is reprinted in the Appendix (App. 1). The opinion over which writs are currently sought is also unpublished and the cite is currently unavailable. This opinion is reproduced at App. p. 5. The United States District Court for the Middle District of Louisiana issued Summary Judgment, which is not officially reported. The District Court opinion directly at issue in this writ application is reproduced at App. p.5.

STATEMENT OF JURISDICTION

The decision of the Court of Appeals for the Fifth Circuit was issued on December 4, 1998. A timely notice of appeal was filed on June 17, 1998. This court has jurisdiction pursuant to 28 U.S.C. Sec. 1254(1).

STATEMENT OF THE CASE

I.

FACTUAL BACKGROUND

The Petitioner, **OLIN DAWSON**, a retired military person sought and obtained employment at Louisiana State University and Agricultural College in Baton Rouge, Louisiana (hereinafter referred to as LSU). The Petitioner, **OLIN T. C. DAWSON**, initiated this action to redress the wrongs perpetrated on him and the adverse treatment by his employer due to the racially discriminatory policies, practices, customs and usages practiced by LSU.

The Petitioner, **OLIN T.C. DAWSON**, was employed by Respondent in October of 1980, and remained in that employ until September 15, 1994, when he was suspended

and forced off the campus upon moments notice under threat of being escorted by the campus police, to his surprise. He was terminated on February 28, 1995, without having been permitted to return to work. During his employ with the Respondents, he was employed first as an Assistant Dean of Students. Then in 1981 he was moved to the position of Assistant Director of Residential Life. In 1985 he became the Assistant Director/Coordinator of Residential Life until July 1, 1994 when his title changed to Assistant Director.

In 1994, **MR. DAWSON** continued to express concern about his continuing wage disparity, when he found out that his position was effectively being phased out, he was asked to apply for a position that he occupied, he applied for the newly created "second in command" position, and he filed an EEOC complaint. Simultaneously, with these inquiries and occurrences, the discriminatory practices accelerated and the efforts to terminate Mr. Dawson's employment became more aggressive. He was given, for the first time, lower performance evaluations alleging inappropriate anger. He was constantly criticized, reproved, retaliated against, harassed and "set-up" for firing.

The record is replete of memos from **DORIS COLLINS** and **DEBRA BAKER,** his immediate supervisors, attacking his every move and alleging unfounded and unsubstantiated complaints against him which were *not* communicated to him until **FOREST BENEDICT,** the Personnel Director, used them to fire him under the PRETEXT of a business interest.

LSU denied Petitioner due process of law in his suspension, pre-termination, and termination and failed to notify him of the events forming the basis of the seventeen alleged infractions contained in the 9/15/94 **BENEDICT** correspondence. This action is contrary to LSU's

own "Employee Discipline Procedures" wherein it is recited that the general policy at LSU is to "provide due process to the employee". Had Mr. Dawson been notified and given an opportunity to respond to the alleged infractions as they occurred, he would have been able to successfully defend.

II.

LOWER COURT PROCEEDINGS

Petitioner was granted a broad scope of discovery by the Magistrate on his Motion to Compel Discovery. The Respondents appealed the Magistrate's ruling and the Petitioner filed opposition objecting to the appeal. The District Judge heard the hearing on the issue of the Respondent's appeal of the scope of Discovery. The District Judge reversed the Magistrate and remanded and ordered the Magistrate to narrow the scope of the discovery consistent with his ruling on appeal.

On the *very same date* of the signing of the ruling narrowing the discovery, the Respondents filed a motion for Summary Judgment. Petitioner thereafter filed into the record written objections and Opposition to Respondent's Motion for Summary Judgment. On June 9, 1998, District Court entered Judgment in favor of Respondent and against Petitioner dismissing Petitioner's case with prejudice. Petitioner timely appealed to the U.S. Court of Appeals, Fifth Circuit. The appeal Court in a per curiam opinion denied Petitioner's appeal and affirmed the decision of the District Court. The Petitioner now seeks writs to the U.S. Supreme Court.

REASONS FOR GRANTING THE WRIT

I. The District Court erred in granting the summary judgment.

The Respondent contends that the District Court erred in granting summary judgment in this employment discrimination case where termination of employment occurred.

LSU filed this motion for summary judgment and was successful before the magistrate and the district court judge. The only valid evidence in the record was the Deposition of Olin Dawson, the exhibit of Mr. Dawson and the three affidavits of his immediate supervisors. It is Petitioner's contention that the evidence before the court was inadequate and, more so, incompetent to support the granting of the summary judgment because it is hearsay evidence.

1. The Summary Judgment:

The Summary Judgment is provided for in the Federal Rules of Civil Procedure at Rule 56. It reads in pertinent part:

> "(b) For Defending Party.
> A party against whom a claim . . . is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereon.
> (c) Motion and Proceedings thereon.
> . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

> (e) Form of Affidavits; Further Testimony; Defense Required.
> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.

Title VII prohibits employers from discriminating against employees on the basis of race, color, religion, sex or national origin. 42 U.S.C. Section 2000e. This court continues to adhere to the evidentiary framework of Title VII complaints pursuant to the jurisprudence established by the United States Supreme Court in the case of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). In the context of summary judgment, a substantial conflict in evidence must exist to create a question on the issue of discrimination. *Rhodes v. Guiberson Oil Tools*, 75 F.3rd 989 (5th Cir. 1996).

2. Adequacy of Evidence of record in Support of the Summary Judgment

It is Petitioner's contention that the evidence in the record of this proceeding is not adequate nor competent to support the granting of a summary judgment.

Under *McDonnell, supra*, the proof for individual discrimination cases was established. The case stood for the proposition that a complainant in a Title VII case must carry the initial burden under the statute "of establishing a prima facie case of racial discrimination. Essentially the court is saying that once a petitioner carries the initial burden, then the burden shifts to the employer to establish some legitimate, nondiscriminatory reason for the

employee's rejection. Moreover, this case stood for the proposition that in individual Title VII cases, the complainant may utilize statistical data to support and corroborate his claim of discrimination.

In the instant case the Respondent has distorted the facts of the case by submitting unsubstantiated facts attempting to allege a nondiscriminatory basis upon which the decision to terminate Mr. Dawson is based. However, the submissions by Respondent's were allegations of mostly unidentified persons for whom Respondents three Affiants relate to the court in these proceedings. At no time have they offered any testimony or competent evidence which supports the allegations of Mr. Dawson's hostility. On the contrary, the Petitioner has submitted his testimony on the myriad acts of discrimination against him, particularly the acts of Debra Baker and Doris Collins in the last months of his employment at LSU. The pattern of discrimination by these persons is vivid and clear as the record demonstrates.

Mr. Dawson, in addition to his declaration of the discrimination towards him submits the statistical exhibit which clearly shows that LSU had no place for Blacks in their employment structure beyond the ranks of janitorial help, in spite of the fact that their location is in Baton Rouge Louisiana where there are many institutions of higher learning, in which Black and other minorities have matriculated thereby providing a pool of qualified employees on any level.

3. Why the Summary Judgment should be reversed and the case remanded for trial

The Petitioner's contends that the summary judgment should be reversed in favor of this case going to

trial in that there are genuine issues of material fact that must be litigated on a full scale trial on the merits.

The Petitioner's statistical exhibit demonstrates that in the hierarchy of the Residential Life Department at LSU, the only Black was Olin Dawson and the janitorial department contained a majority of black employees if not all.

Further the record reflects that from the time that Debra Baker took office there is demonstrated an intentional pattern of demeaning communications regarding Mr. Dawson's work and character. There is an attempt to paint an awful picture of him, but the actual culprit is the person who all of a sudden, began to write bad communications about an employee who had a proven record of excellence, until he was a competitor for a job which LSU would not allow a Black to hold and for which the new supervisor was a competitor.

The Petitioner has demonstrated via the record of this proceeding that there are genuine issues of material fact for trial. Additionally, the allegations against the Petitioner by Respondent are pretextual and based on hearsay and unfounded and unsupported allegations, all of which the Petitioner has denied consistently. In the case of *Colazo v. Condado Plaza Hotel* (1996, DC Puerto Rico) 941 F. Supp. 16, it was established that, regarding the defense motion for summary judgment pursuant to FRCP 56(e), in this personal injury action against a hotel, the hotel's security director's sworn statement was *hearsay and would not be considered.* It is clear that the Court believed that the director's sworn statement of events he did not witness or had no personal knowledge did not constitute competent evidence. Likewise, in the instant case, Summary Judgment was granted on sworn statements which contained allegations that the affiants did

not have any personal knowledge. This is hearsay and unsubstantiated. This evidence is not competent and under the *Colazo* rationale must not serve as the basis for the granting of a summary judgment.

In the case of *Josey v. John R. Hollingsworth* (1993, CA3 Pa.) 996 F.2d 632, in an employment discrimination case, consideration was given to factors such as Respondent employer's credibility, timing of employee's dismissal, and employer's treatment of employee which raise an inference of pretext that would make summary judgment for the employer inappropriate.

It is very obvious in the instant case that Ms Baker set out, shortly after being hired, to aggressively build a record against Mr. Dawson in an effort to support his ultimate termination. However, the credibility of the statements and allegations are doubtful, the timing of the employee's dismissal is close in proximity to the beginning of the harassment, and the very clearly obvious hostility that the employer exhibited against the employee supports the fact of the whole scenario being a pretext, which should render the granting of a summary judgment inappropriate.

The jurisprudence supports a decision against the granting of a summary judgment if there is any evidence of a genuine issue of material fact.

The following is argument supporting the issues identified by the Petitioner.

(1)

The Respondents maintain policies, practices, customs, and usages of discrimination.

In an effort to demonstrate the blatant campus-wide policies, practices, customs, and usages of discrimination against Petitioner, other Blacks and minority races, the

Petitioner attempted to secure campus-wide statistics to demonstrate that Respondents employ less than ten (10%) percent of the Blacks composing the Relevant Labor Market, however his efforts were rejected when he was unable to secure the responses to discovery which would have provided that information.

There are approximately 25% to 35% Blacks in this Parish, surrounding parishes and the State. In these numbers are Blacks with households wherein more than two persons are college educated. Notwithstanding, with respect to the available educated and technical Black labor market, the Respondents do not hire them. Respondents hold "token" positions for Blacks and when one leaves they generally hire another Black, but never increase the number. In the Instant case, Mr. Dawson was the only Black in the professional/technical employ of the Residential Life Department, and when he was terminated he was replaced by another Black.

In Petitioner's "Report of Expert", a finding was made that the Respondents hired more than 95% blacks in laborer jobs in the Residential Life Department, and less than 2% Blacks in the higher level jobs. (See Record). Although the campus wide statistics were withheld, the campus-wide set up follows the same practices, policies, customs and usages of employment discrimination due to race as the Residential Life Department.

LSU commissioned a report styled "External Review, Department of Residential Life at Louisiana State University, Baton Rouge, Louisiana". On page 2 of the Report in paragraph 1, it is stated:

"Introduction and Purposes"

> The purpose of this report is to summarize the findings relating to the residential life review

> conducted at Louisiana State University. This external review was requested by the Director of Residential Life, Ms. Doris Collins,. . . .

This study, which was authorized by LSU, went on to say at Page 11, Paragraph 9, that:

> *"The lack of African-Americans with the professional ranks of the department is obvious. The number of African American students in relationship to the number of African-American professional staff is deficient. On the other hand, the number of African-American hall staff members is exceptional in relation to the number of African-American residents."*

Needless to say the "African-American hall staff members" referred in the last sentence of the quote, were positions of custodians." Petitioner's Expert Report shows that all of the custodial workers were Black.

This study serves as an indictment against LSU, and it supports the position of Petitioner. The hiring and inclusion of African-Americans never occurred, even after the study. In fact, the Respondent proposed to keep the population and racial make up as it was thereby restricting any increase in the number of African-Americans in the Department.

The Respondents' policies, practices, customs and usages of racial discrimination against Petitioner, other blacks and racial minorities pervades their hiring, promotional and disciplinary practices.

(2)

The Respondent discriminated against Petitioner by denying to him equal opportunity for employment, job assignments, promotions, wages/compensation and other terms, conditions and privileges of employment

The Petitioner was a victim of the continuing discrimination by the Respondent. Specifically, Mr. Dawson

began complaining about the continuing disparity in salary as early as 1983. It should be noted that in denying Petitioner parity in salary, the Respondent's own statistical comparison data used to justify the disparity is flawed.

Mr. Dawson's salary is compared on a campus-wide basis with other persons in "Assistant Director" positions, while completely ignoring that the persons with whom he was compared had less experience, less education, and greater salaries.

Mr. Dawson was also discriminated against in the work load. *As of July 1, 1993, Petitioner was responsible for the supervision of eight dormitories and over 1600 persons.* Prior to this date Mr. Dawson was responsible for some six dormitories.

Again it is very significant that Respondents were giving Petitioner *additional job responsibilities while conversely alleging that he was having "problems" with job performance and attitude.*
(SJ Rec. Pl. Ex. 3 in globo). Clearly Respondents' actions were not only pretextual as a prelude to termination, but constitute clear evidence of racial discrimination in salary and workload.

The Respondents' actions were of the same type of discrimination which gives rise to a continuing violation. Mr. Dawson complained yearly about the disparity between his salary and the continued increase in his work load and responsibilities. Respondents' argument that Petitioner's "promotion" and increase in salary defeats his claim of discrimination. This belies the fact that there existed during all relevant periods a gross disparity in Petitioner's salary and duties and responsibilities.

In *Berry v. Board of Supervisors of L.S.U.*, 715 F.2d 971, (5th Cir. 1983), *cert. denied*, 479 U.S. 868 (1986), the Fifth

Circuit vacated summary judgment against the Petitioner on issues of salary discrimination and workload discrimination for a determination of whether a claim of continuing violation could be proven by the Petitioner. The court gave the following guidance to the district court:

> "This inquiry, of necessity, turns on the facts and context of each particular case. Relevant to the determination are the following three factors, which we discuss, but by no means consider to be exhaustive. The first is subject matter. Do the alleged acts involve the same type of discrimination, tending to connect them in a continuing violation? The second is frequency. Are the alleged acts recurring (e.g., a biweekly paycheck) or more in the nature of an isolated work assignment or employment decision? The third factor, perhaps of most importance, is degree of permanence. Does the act have the degree of permanence which should trigger an employee's awareness of and duty to assert his or her rights, or which should indicate to the employee that the continued existence of the adverse consequences indicate to the employee that the continued existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate? As noted the individual context of individual employment situations requires a fact specific inquiry by a trial judge which cannot easily be reduced to a formula. We feel, however, that consideration of the above factors will generally be appropriate."

(3)

The Respondents discriminated against Petitioner by depriving him of equal employment opportunities.

The Petitioner had held positions with the Respondents. The Respondents were well aware of their inadequacy in the area of hiring and maintaining of employment of African-American professionals in the subject Department.

As far back as 1990, it is affirmed as per a memo from Chancellor Williams E. Davis to all Deans, Directors, and Departments that "racial commenting, jokes, slurs, innuendos, or acts of racial harassment have no place at the University". "The administration is committed to revitalization of equal opportunity and affirmative action programs." (SJ Record Pl. Ex. 5). Employers should not violate their own rules in any effort to negatively affect an employee. *Hill v. Seaboard Coastline, R.R.*, 885 F.2d 804 (1989).

The statistical data offered by Petitioner to equal employment opportunity denial is capable of establishing of a prima facie case of the denial of equal employment opportunities. *Walther v. Lone Star Gas Co.*, 952 F.2d 119 (5th Cir. 1992). This proof of prima facie case of discrimination is sufficient to overturn the summary judgment on the issues. *Berry v. Board of Supervisors, LSU, supra.*

(4)

The Respondents discriminated against Petitioner in giving him a less than good performance evaluation, which set the stage for the barrage of complaints from his supervisor which were sent every few days.

HARASSMENT AND RETALIATION

The record will reflect that **MR. DAWSON** filed a formal complaint with the U.S. Department of Justice. (Dawson Exhibit)

Ten days later Respondent received a lower employee rating in specific areas.

MR. DAWSON'S previous evaluations by **Doris Collins** dated 5/25/93 under **MRS. COLLINS'** signature, rates **MR. DAWSON** outstanding and/or competent higher in all categories; it should be noted that this stands in direct contradiction to Respondent's inference that Petitioner was continually exhibiting "problems" with anger and violence. The Respondents are guilty of retaliatory acts against Petitioner in violation of the Civil Rights Act and the Fourteenth Amendment.

MR. DAWSON was legally within his rights to complain about what he perceived to be discriminatory treatment in the Resident Life Department.

The retaliation claim does not rest on the underlying discrimination claim and even the application of the *McDonnell Douglas, supra,* pattern of proof will not necessarily defeat a claim of retaliation.

The key to **MR. DAWSON's** claim of retaliation and harassment is the connection. In *Julif v. Andel Corp.,* 73 F.2d 701 (3d Cir. 1989), the Court held that summary judgment should not have been granted against Petitioner when Petitioner filed a charge of discrimination on September 26, filed another on October 17, which was received by the employer on October 28. The Petitioner was thereafter fired on October 30. The court stressed that chronology was highly probative of his retaliation claim. In reversing a district court's dismissal of retaliation claims, the Court in *Miller v. Fairchild Industries,* 876 F.2d 718 (9th Cir. 1989), relied almost solely on the fact that the discharges followed shortly after equal employment opportunity proceedings in holding that there was enough evidence to go to a jury.

Mr. Dawson filed a complaint with the Justice Department on 5/23/94. On June 6, 1994, **MR. DAWSON** received the first seriously negative and adverse employment evaluation and memorandum. Thereafter, Respondents proceeded with a barrage of negative complaints regarding job performance.

On October 12, 1994 the Petitioner filed a complaint with EEOC. On October 20, 1994, the Petitioner received a letter from **WILLIAM DAVIS**, stating the University's intent to determine the termination of his employment within two weeks. Clearly, Petitioner has established that there are genuine issues which defeats the Respondent's Motion for summary judgment.

(5)

The Respondents discriminated against Petitioner in Promotions.

The resume of Debra Baker and the resume of Olin T. C. Dawson along with the job descriptions of the positions of Associate Director of the Residential Life Department, the Assistant Director of the Residential Life Department (pre-revised under so-called reorganization (SJ Record Pl. Ex. 3), Assistant Director of Residential Life Department (revised under so-called reorganization (SJ Record Pl Ex. 3), and the newspaper advertisement of the position of Associate Director of Residential Life Department (See Record), present to the court the basic evidence regarding the hiring of Debra Baker.

Let it be noted that Mr. Dawson's resume presents a more seasoned, qualified and experienced candidate for the position.

(6)

The Respondents discriminated against Petitioner in forcing him to apply for a position that he already held.

The job descriptions of the positions of Assistant Director of the Residential Life Department (pre-revised under so-called reorganization) and Assistant Director of Residential Life Department present to the court the basic evidence regarding the hiring and promotion of Mr. Dawson into a higher position in the Department. However, the testimony of Mr. Dawson, his witnesses and the submission of documentary evidence as to the changes, will demonstrate that Mr. Dawson was in fact applying for a position that *he was currently holding.*

Mr. Dawson held the position titled Assistant Director/Area Coordinator. He subsequently, having been employed in the department for over 13 and 1/2 years, applied for the so-called revised/reorganized position of Assistant Director.

Persons who are non-target group members have been routinely appointed to their respective positions, *i.e.*, Doris Collins, Bert Daigle. Even after Mr. Dawson's termination persons such as Lori Patterson (white female) was merely "upgraded" to positions. (See SJ Record).

The Petitioner is a member of a target group. There is statistical data to support a pattern of restriction of the target group, African-American professionals from upper managerial/administrative positions. This is evidence of a prima facie case of discrimination by continuing a pattern of behavior, benefitting white employees, and the same accommodations being denied to African-American persons.

Summary judgment should not issue when there are material issues that should be heard by the trier of fact. It remains as a material issue that white employees are

shown more favorable treatment. When the prima facie showing of discrimination and disparate treatment is made, the summary judgment should not lie.

(7)

The Respondents discriminated against Petitioner in forcing him to work in a hostile work environment wherein he encountered harassing complaints, criticisms, hostile attitudes, hostile actions and other intimidation.

Petitioner was subjected to a very hostile work environment through Respondents' continuous barrage of complaints about his job performance and attitude. The actions of Doris Collins and Debra Baker in an attempt to develop a paper trail for their planned termination of Mr. Dawson was unrelenting and pervasive as to the Petitioner's employment condition and created an abusive working environment. *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

Consider, it is not disputed that the Petitioner work for twelve years consist of outstanding evaluations in his job performance. Within a month of the promotion of Doris Collins, the hiring of Debra Baker, and coupled with the Petitioner's formal complaint of discrimination, the Petitioner began to receive daily memorandum and complaints regarding his job performance.

(8)

The Respondents discriminated against Petitioner in retaliation and harassment due to the complaints made to the Equal Employment Opportunity Commission.

Respondents discriminated against Petitioner in retaliation and harassed him due to complaints filed by

Petitioner to the Justice Department and the Equal Employment Opportunity Commission.

Mr. Dawson filed a complaint with the Justice Department on 5/23/94. On June 6, 1994, **MR. DAWSON** received the first seriously negative and adverse employment evaluation and memorandum. Thereafter, Respondents proceeded with a barrage of negative complaints regarding Mr. Dawson's job performance.

(9)

The Respondents discriminated against Petitioner by Doris Collins and Debra Baker beginning to write memos and entries which caused his employment to be jeopardized, and ultimately terminated. PRETEXTUAL CONDUCT

The Petitioner had reason to believe that the decision to hire **DEBRA BAKER** was made prior to the advertisement of the position she now holds. The obvious lack of fair treatment of Petitioner during the purported interview process, and subsequent to the hiring of **DEBRA BAKER**, prompted Petitioner to criticize the negative activities that he experienced. There resulted an obvious campaign of memo and letter writing of every possible act of **MR. DAWSON**. These alleged acts were systematically placed in the file of **MR. DAWSON**. There is such a concentration of memos and letters in his file, all or predominately all appearing after the arrival of **DEBRA BAKER**.

This is evidence of a pattern of conduct designed to lay groundwork for the termination of **MR. DAWSON**. This is a discriminatory intent in action. A reasonably fair minded finder of fact might reason from the presentation of this evidence that this is pretextual conduct. This is argued based upon the fact that **MR. DAWSON** had 13

years of excellent evaluations and the extreme concentration of negative memos and letters only in the last 4-6 months of his employment. Petitioner First Amendment protection as well as obvious pretextual actions are implicated.

Summary Judgment should not apply on the issue of pretextual conduct *Randle v. City of Aurora*, 69 F.3d 441 (10th Cir. 1995), the Court reasoned:

> "At trial, employment discrimination Petitioner must convince Jury not only that reason proffered by Respondent for adverse employment decision was pretextual but that Jury should infer that Respondent, pretext concealed motive of discriminating against Petitioner in violation of civil rights laws; it is this last inference which must be established at trail, but which is not required to be found by judge at ultimate inference from evidence is within province of Jury."

Written documents including the Petitioner's deposition refers to acts of non-targeted group persons exhibiting similar actions, *i.e.*, dozing off in meetings but those persons received no disciplinary action. In a discipline or discharge case the evidence may show that those not in the Petitioner's group have received different or no discipline for the same offenses or more grievous offenses then that with which the Petitioner is charged. This is important because, even if (and we contend that he is not) Petitioner is guilty of an offense that would provide a reasonable basis for discharge, the discharge would still be illegal if comparable behavior by non-targeted group employees has not been given similar discipline as was noted in case such as *Williams v. Giant Eagle Markets*, 883 F.2d 1184 (3d Cir. 1989). Bert Daigre, as noted on several occasions to have used profanity in open department meetings, is a white male who was never reprimanded.

A negative evaluation that follows a long period of good performance ratings can be evidence of pretext. The Fifth Circuit has recognized this; *Norris v. Hartmarx,* 913 F.2d 253 (5th Cir. 1990). Similar rulings were recognized in *Blanchard v. Stone Safety Corp.,* 935 F.2d 18 (2nd Cir. 1991); *Monroe v. Burlington Industries,* 784 F.2d 568 (4th Cir. 1986). Summary Judgment is reversible under these types of conditions pretextual in their nature. *Duchan v. Cajon Co.,* 791 F.2d 43 (6th Cir. 1986).

The Respondents clearly attempted and in fact laid a paper trail against **MR. DAWSON**. As employers become more mindful of the illegal nature of discrimination, some calculatedly created a detailed paper trail, believing such will prove their actions lawful. Some wise courts have noted – much in the spirit of the contract doctrine of "too good to be true" – that too good a paper trail itself may be evidence of pretext. *Kreiger v. Gold Bond Building Products,* 863 F.2d 1091 (2nd Cir. 1988).

There is an inference clearly raised of pretext which should be admitted to the province of the Jury. Summary judgment should not apply to this timely raised complaint.

(10)

The Respondents discriminated against Petitioner by denying him due process hearings regarding his discipline and termination. DISCRIMINATON IN LACK OF DUE PROCESS OF LAW

Petitioner asserts that Summary Judgment is inappropriate due to Respondents failure to afford due process in accordance to Law. U.S. Constitution Fourteenth Amendment.

The United States Constitution provides at the Fourteenth Amendment that:

> "Section 1. *All persons born* or naturalized *in the United States,* and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*"

Summary Judgment is not appropriate in the dismissal of a public employee. This is especially true when the employee has not been afforded due process a chance to address the allegation against him to call witness or to have the assistance of counsel. *Page v. DeLaune,* 837 F.2d 233 (1988, CA 5 TX).

The appellate court has a duty to review summary judgments de novo. The Court of Appeals reviews a summary judgment applying the same standards as used by the district court, reviewing the facts and drawing inferences in favor of the non-moving party. *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Hall v. Dow Corning Corp.,* 114 F.3d 73, 76 (5th Cir. 1997).

There was sufficient evidence of pretextual conduct presented in the pleadings affidavits and documentation. This argument was made to the Fifth Circuit in Petitioner's brief. As noted, in the reference to the continued period of good performance ratings followed by a negative performance rating, this is evidence of pretext. This has been noted by the courts in *Blanchard v. Stone Safety Corp.,* 935 F.2d 18 (2nd Cir. 1991); *Monroe v. Burlington Industries,* 784 F.2d 568 (4th Cir. 1986), *Norris v. Hartmarx,* 913 F.2d 253 (5th Cir. 1990).

If there is pretext shown in the facts then the judgments rendered therein are reversible. *Duchan v. Cajon Co.*, 791 F.2d 43 (6th Cir. 1986).

Even if the statistical data offered would be insufficient to demonstrate a pattern and practice of discrimination, it might still be relevant in making out a prima facie case of or in proving pretext. *Washington v. Brown & Williamson Tobacco Corp.*, 756 F. Supp. 1547, 60 FEP 784 (M.D. GA 1991), *aff'd*, 959 F.2d 1566, 60 FEP 800 (11th Cir. 1992).

The lower court and the appellate court erred in failing to properly consider the statistical data.

II. Whether appeal court erred in failing to review or address the District Court Judge's order reversing the decision of the Magistrate Judge, when Petitioner timely filed objection and opposition to the District Judge's ruling, in the Appeals Court's ruling that this issue was "not properly before the court."

The Appellate court erred in failing to review the issue of whether or not the District court erred in narrowing the scope of discovery. Legally the rules require that any magistrate's ruling not agreed with must be appealed to the District Court Judge.

Factually, the Magistrate Judge ruled in the Petitioner's favor on the Motion to Compel Discovery. She granted a broad scope of discovery. The Respondents appealed to the District Court Judge. The Petitioner filed opposition to the appeal. There was a hearing on the scope of the discovery before the District Court Judge. The District Court Judge reversed the Magistrate Judge and ordered that she rule in compliance with his order narrowing the scope of discovery. The language of the District Judge's order specifically stated:

> "Considering the broad scope of the Magistrate's Ruling, It is further ordered that the 8-7-97 ruling of the magistrate Judge be reversed and remanded to Magistrate Judge for further review and consideration."

The District Judge shall consider the appeal and set aside any portion of the order found to be clearly erroneous or contrary to law. Rule 74.1 Local Rules.

The District Judge erred in setting aside the granting of the broad scope of discovery in this an employment discrimination suit. Several cases have been pronounced on the issue of the scope of the discovery in an employment discrimination suit. *McDonnell Douglas v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

The employment discrimination Petitioner has the duty in order to win his case, to prove by a preponderance of the evidence that the proffered reasons were not the employer's true reasons. *Sorba v. Pennsylvania Drilling Company*, 821 F.2d 200, 202 (3rd Cir. 1987), *cert. denied*, ___ U.S. ___, 108 S.Ct. 730, 98 L.Ed.2d 679 (1988). The Petitioner argues that he could not prove his case and the true reasons by direct evidence. He could prove the pretextual termination and/or the true reasons through the patterns and practices of the Respondents. This is accomplished in employment discrimination and disparate treatment cases through broad scoped discovery. The District Judge evidenced his intent to order reversal of the broad scope of the Magistrate's original ruling on the Motion to Compel.

The Fifth Circuit relies upon the case of *Singletary v. B.R.X., Inc.*, 828 F.2d 1135, 1137 (5th Cir. 1987). In that case there was only one issue that the Petitioner failed to appeal or challenge until after the trial. The court in *Singletary* said "this deprived the trial judge of his ability to effectively review the magistrate's holding." At bar,

the magistrate had ruled in the favor of the Petitioner on his motion to compel. The Respondents appealed. The Petitioner filed opposition to the appeal. A hearing was had before the district Judge on the motion to compel. Petitioner objected and opposed the reversal of the magistrate's prior ruling. The District Judge ordered that the magistrate's prior ruling be reversed and remanded for ruling consistent with his order. This was an order of a District Court Judge which the Magistrate Judge *must* comply with. This is not the Magistrate Judge's original ruling and interpretation of the law. At this point the Petitioner is not appealing the Magistrate Judge's ruling but is appealing an ORDER of the District Judge. The District Judge specifically ordered the reversal of the Magistrate's Ruling as to the "broad scope" of her ruling. Petitioner opposed and objected to the Magistrates ruling before it occurred. The Appeals Court erroneously ruled that this was not properly appealed to the District Court. The record will reflect Petitioner's objection.

On the same date of the pronouncement of the Magistrate's ruling, the Respondents filed a motion for summary judgment. The Petitioner had to prepare and did prepare opposition to the motion for summary judgment within which Petitioner objected to the narrowing of the scope of discovery. The motion for summary judgment did not occur before the ruling narrowing the scope of discovery. In that the decision on the scope of the discovery and the motion for summary judgment happened upon the same day based upon the same issues, Petitioner feels it cannot be said that opposing summary judgment is not objection or opposition to the narrowing of the discovery.

The original ruling of the Magistrate Judge granting broad discovery is permissible in employment discrimination cases. *McDonnell Douglas v. Green,* 411 U.S. 792 (1973). Judge Frank Polozola by order reversed the Magistrate and established the scope of the Petitioner's discovery. This was an improper denial of discovery. It would be appropriate not to hesitate to reverse a dismissal on the ground that the Petitioner was improperly denied discovery. *Wyatt v. Kaplan,* 686 F.2d 276, 283 (5th Cir. 1982).

There was no showing as required in the local rule 74.1 of the Magistrate's Ruling on the scope of discovery being clearly erroneous and/or contrary to law which would require the District Judge to set it aside.

This was an evidentiary ruling which the court should consider the total impact thereof. The courts have assessed the effect of evidentiary rulings. *Estes v. Dick Smith Ford, Inc.,* 856 F.2d 1097, 47 FEP 1472 (8th Cir. 1988). The narrowing of the scope of discovery constituted a pre-trial blanket evidentiary exclusion in this employment discrimination case. The courts have admonished against "blanket evidentiary exclusions . . . in employment discrimination cases." *Hawkins v. Hennepin Technical Center,* 900 F.2d 153, 155-56, 52 FEP 885 (8th Cir. 1990).

These are exceptional circumstances constituting a miscarriage of justice which should make these issues which all were presented to the trial court, proper to be considered on appeal. *Jones v. Birdsong,* 679 F.2d 24, 25 (5th Cir. 1982), *cert. denied,* 459 U.S. 1202, 103 S.Ct. 1186, 75 L.Ed.2d 433 (1983).

The issue here is not the appeal of a Magistrate's ruling to the District Court, but the appeal to the Court of Appeal of a District Judge's Order. At any rate, prior to

the rendition of the Summary Judgment Order, the Petitioner complained about the narrowing of the scope of the discovery. He did complain to the District Court Judge who despite the complaint signed the summary judgment order noting our objections. If he notes our objection and our objection contained the opposition and objection to the narrowing of the scope of the discovery it is a part of the record for review. This was properly before the Court of Appeals. They erred when they failed to review the same.

It was a miscarriage of justice to order a narrowing of the scope of the discovery to prevent proof of judicially recognized complaints of similar and more egregious conduct by white men which have gone unpunished. In the record Petitioner discusses the case of Aaron Schmidt, a white male employee of the Respondents who has been sued more than once for his violent and threatening behavior and was never reprimanded and especially not terminated. A lawsuit is pending before the United States District Court in the Middle District of Louisiana and we asked the Fifth Circuit and this Court to take judicial notice of the existence of this pending suit. The discharge of Petitioner, even if he was guilty of an offense, would still be illegal if comparable behavior by non-target group employees has not been given similar discipline.

White male supervisors and professors on LSU's campus have been accused of choking people, threatening people, harassing people, and actually spanking women, and still remain employed with LSU. Petitioner was immediately demanded to leave the campus and terminated.

Petitioner offered campus statistical data into the record which would establish the patterns and practices

of the Respondents as well as a report done by an independent surveyor for the Respondents. This survey showed the racial hiring disparity of whites over blacks in supervisory positions. When there is some pattern and practice evidence introduced, the employment discrimination Petitioners are not precluded from introducing statistical evidence as circumstantial evidence of discrimination in a disparate treatment case. *Furnco Construction Corp. v. Water*, 438 U.S. 567, 578 (1978); *Abrams v. Lightolier, Inc.*, 50 F.3d 1204, 677 FEP 543 (3d Cir. 1995). There exists not only disparate treatment pattern and practice evidence, but also paper trail creation and statistical data evidence which should have precluded a granting of summary judgment. Even the existence of disparities which are insufficient to demonstrate a pattern and practice of discrimination, might still be relevant in making out a prima facie case or in proving pretext. *Washington v. Brown & Williamson Tobacco Corp.*, 756 F. Supp. 1547, 60 FEP 784 (M.D. GA 1991), *aff'd*, 959 F.2d 1566, 60 FEP 800 (11th Cir. 1992). The Petitioner by the actions District Court restricting his discovery of relevant evidence, has been denied the opportunity to make his case for disparate treatment. The appellate court erred in failing to properly review the entire record for the obvious evidence of proof of the Petitioner's case, and have ruled contrary to law on the issue of scope of discovery in an employment discrimination suit.

Summary judgment for Respondents should be reversed and remanded to the District Court for ruling and ultimately to trial on the merits. He could defeat Summary Judgment had his discovery request been granted. *Hotel & Restaurant Employees Union Local 25 v. Attorney General of the United States*, 804 F.2d 1256 (1986, App. D.C.)

III. The Petitioner was entitled to due process, as guaranteed by the Fourteenth Amendment of the U.S. Constitution, when the Respondents by the language in their employment policy accorded Petitioner due process thus creating a property interest in continued employment.

The Appeals Court erred in ruling that the Petitioner, Olin Dawson, failed to establish a right to Due Process because he did not prove that he had a property interest in his employment.

This Honorable Court has long established that State law can create a property interest in continued employment. *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701 (1972). LSU in its policy governing employee discipline procedures, clearly states that all employees must have due process. Additionally, all employees must be given a copy of their position duties and responsibilities so the employee will be forewarned of the consequences of failure to meet job expectations.

Mr. Dawson had thirteen years of service with the Respondent in which he received excellent job rating every year prior to the action of the Respondents which ultimately lead to his termination. According to the Respondents' policy Mr. Dawson could only be dismissed with due process and the approval of the Chancellor and the President.

The Fifth Circuit erred in ruling Mr. Dawson was not entitled to due process when the very policy that governed his employment gave him this right.

The facts of Mr. Dawson's case are analogous to a line of cases in which this Court ruled that such language suffices to create a property right and thus affords a Petitioner the right to due process. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487 (1988).

At the time the Petitioner was summarily dismissed from his position at LSU, he was given a document containing seventeen unsubstantiated, hearsay allegations which Respondents claim were the reasons for termination. Mr. Dawson had not received any prior notice of these allegations. He was not given an opportunity to discuss or refute these allegations.

Contrary to the ruling by the Fifth Circuit, the summary judgment record reflects that upon immediate receipt of the allegations, Mr. Dawson was ordered to leave the campus and told he could not return. More importantly, this document of September 15, 1994 stated, ' . . . you are immediately and permanently relieved . . . ' of his job in the Residential Life Department. (SJ Rec. Pl. Ex. 1)

The Due Process Clause requires that a State, before depriving a citizen of property, provide "some kind of hearing," *Loudermill*, 105 S.Ct. at 1493. An employee who is entitled to due process is entitled to, at a minimum, 1) oral or written notice of the charges against him, 2) an explanation of the employer's evidence and 3) an opportunity to present his side of the story. *Loudermill, supra.*

Mr. Dawson was immediately removed from his position without any hearing or opportunity to respond to the Respondents' unsubstantiated hearsay allegations. In many of the allegations no information as to who made the allegation or under what circumstances the alleged complaint occurred was provided to Mr. Dawson. Any claim that Mr. Dawson had an opportunity to respond and thus was not denied due process, when he had already been *"immediately and permanently"* removed from his position in the Residential Life Department, flies in the face of the law. Due process after the fact is not due process.

CONCLUSION

Petitioner throughout his career in Respondents' employ, served faithfully, in fairness and honesty. They in turn overlooked him for a promotion and hired a younger white female instead. They treated him in such a way that he would lodge complaints. They constructed an improper, and unlawful paper trail of unsubstantiated wrongdoing all concentrated into a brief specified period. They banished him from the campus and terminated him without allowing him the due process guaranteed to all employees, as to the false allegations. The courts restricted his ability to prove disparate treatment. Yet he proved the paper trail establishing pretextual conduct. Certainly, summary judgment should not issue and the permissible broad scope discovery should be allowed to establish that white males have done the same or more egregious acts and remained employed. The alleged petty acts attributed to Petitioner were not substantiated, and even if proven, if white males were treated more favorably discrimination is established. Ultimately, Petitioner has shown proof that there is sufficient evidence in the record framing genuine issues of material fact which merits overturning summary judgment granted by the lower and appellate courts.

Respectfully submitted,

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APPENDIX

Table of Contents

Page

Opinion, U.S. Court of Appeals for the Fifth Circuit, dated December 4, 1998 .....App. 1

Notice of Appeal to the Fifth Circuit Court of Appeal .....App. 3

Order, U.S. District Court for the Middle District of Louisiana .....App. 5

Minute Entry, U.S. District Court for the Middle District of Lousiana .....App. 6

Order, U.S. District Court for the Middle District of Louisiana Reversing Magistrate Ruling .....App. 7

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-30642
Summary Calendar

OLIN T. C. DAWSON,

Plaintiff-Appellant,

versus

LOUISIANA STATE UNIVERSITY AND AGRICULTURAL AND MECHANICAL COLLEGE; LOUISIANA STATE UNIVERSITY AND AGRICULTURAL AND MECHANICAL COLLEGE, Board of Supervisors,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Louisiana
(95-CV-653)

(Filed Dec. 04, 1998)

Before KING, BARKSDALE, and STEWART, Circuit Judges.

PER CURIAM:*

---

* Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

In this race discrimination action, Olin T. C. Dawson appeals the summary judgment in favor of the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College (LSU). Dawson contends that the district court erred by concluding that there were no genuine issues of material fact regarding whether LSU discriminated against him on the basis of his race when it discharged him, and that the magistrate judge court erred by narrowing the scope of discovery.

Having reviewed the summary judgment record and the briefs, we conclude that summary judgment was appropriate, essentially for the reasons stated in the magistrate judge's report and recommendation, which was adopted by the district court.

Assuming, *arguendo,* that Dawson has properly preserved and raised a due process claim, it is without merit, because he has not shown that he had a property interest in his employment with LSU. Moreover, the summary judgment record reflects that Dawson was given notice of the reasons for his discharge and an opportunity to respond.

Finally, Dawson's contention regarding the scope of discovery is not properly before this court, because he did not appeal the magistrate judge's ruling (on remand) to the district court. *See* FED. R. CIV. P. 72(a); ***Singletary v. B.R.X., Inc.,*** 828 F.2d 1135, 1137 (5th Cir. 1987).

AFFIRMED

UNITED STATES DISTRICT COURT
FOR THE MIDDLE
DISTRICT OF LOUISIANA

FILE NUMBER: 95-653

OLIN T. C. DAWSON	*	
	*	
V.	*	**NOTICE OF APPEAL**
LOUISIANA STATE	*	
UNIVERSITY AND	*	(Filed Jun. 17, 1998)
AGRICULTURAL AND	*	
MECHANICAL COLLEGE,	*	
ET AL	*	

Notice is hereby given that Olin T. C. Dawson plaintiff in the above named case, hereby appeals to the United States Court of Appeals for the 5th Circuit from the OPINION of the Court granting the defendant's motion for summary judgment and allowing the dismissal of plaintiff's suit, and the JUDGMENT entered ordering adjudging that judgment shall be entered in favor of the defendants and against the plaintiff dismissing this suit with prejudice, entered on the 8th day of June, 1998.

A TRUE COPY

/s/ Helaine Johna 6/17/98
Signature Date

Richard T. Wenn, Clerk *
U.S. District Court
Middle District of Louisiana
Baton Rouge, Louisiana

/s/ Wendell C. Woods
WENDELL C. WOODS (22694)
ATTORNEY FOR OLIN T. C. DAWSON
8152 SCENIC HIGHWAY, SUITE A
BATON ROUGE, LOUISIANA 70807

DKT. & ENTERED
6/17/98
ILLEGIBLE MAILED TO:

/s/ S. Hehrn
/s/ W. Woods
/s/ J. Crochet
/s/ W. McKenzie

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

OLIN T.C. DAWSON	
VERSUS	CIVIL ACTION
LOUISIANA STATE UNIVERSITY AND AGRICULTURAL AND MECHANICAL COLLEGE	NO. 95-653-M3
	(Filed Jun. 9, 1998)

OPINION

After independently reviewing the entire record in this case and for reasons set forth in the Magistrate Judge's Report to which an objection and a response to the objection were filed:

IT IS ORDERED that the defendant's motion for summary judgment be GRANTED and this suit be dismissed. Judgment shall be entered accordingly.

Baton Rouge, Louisiana, June 8, 1998.

/s/ Frank J. Polozola
FRANK J. POLOZOLA
UNITED STATES DISTRICT JUDGE

APPEAL CLOSED

U.S. District Court
Middle District of Louisiana (Baton Rouge)

CIVIL DOCKET FOR CASE #: 95-CV-653

9/11/97	65	Minute entry: Plft shall have until 09/15/97 to file his memo in opp to the appeal set Brief deadline to 9/15/97, Ordered that the 08/07/97 ruling of the Magistrate be reversed and remanded to the Magistrate Judge for further review and consideration; Ordered that the Magistrate Judge shall reestablish the expert deadlines after resolution of the pending appeal; Vacating [60-1] order set Answers to Interrogatories deadline to 8/27/97, set Dispositive Motion Filing deadline to 1/9/98, set Pretrial Conference for 9:30 2/19/98 (signed by Judge Frank J. Polozola), issued notices (kd)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

OLIN T.C. DAWSON

VERSUS

LOUISIANA STATE UNIVERSITY AND AGRICULTURAL AND MECHANICAL COLLEGE, and through the LOUISIANA STATE UNIVERSITY AND AGRICULTURAL AND MECHANICAL BOARD OF SUPERVISORS

CIVIL ACTION

95-653-B-M3

(Filed Jan. 9, 1998)

ORDER

This matter having come before the Court on rehearing and reconsideration of its prior ruling on plaintiff's motion to compel (rec.doc.no. 36), and for written reasons assigned this date,

IT IS ORDERED that this Court's Ruling and Order of August 7, 1997 (rec.doc.no. 60) hereby is **VACATED** and that plaintiff's motion to compel hereby is **GRANTED IN PART** and **DENIED IN PART** as follows:

1. Interrogatory No. 1: Plaintiff is entitled only to statistical information categorized by race, but not by gender, and only for the Department of Residential Life for the period following the assignment to that department of the new supervisor whom plaintiff alleges adversely evaluated his performance.

2. Interrogatory No. 2: Plaintiff is entitled to the information requested only for the Department

of Residential Life for the period following the assignment to that department of the new supervisor whom plaintiff alleges adversely evaluated his performance.

3. Interrogatory No. 3: Requested statistical information is discoverable back through the period following the assignment to that department of the new supervisor whom plaintiff alleges adversely evaluated his performance.

4. Interrogatory No. 4: Requested statistical information is discoverable back through the period following the assignment to that department of the new supervisor whom plaintiff alleges adversely evaluated his performance. Birth date information is not discoverable.

5. Interrogatory No. 7: Defendants need not respond.

6. Interrogatory No. 8: Requested information is discoverable only for the Department of Residential Life for the period following the assignment to that department of the new supervisor whom plaintiff alleges adversely evaluated his performance. The court finds that the language of the interrogatory to be somewhat ambiguous and interprets this request to mean interoffice correspondence between university personnel. Defendants are only required to make these documents available for inspection and copying and are not required to provide copies for plaintiff, unless the parties agree otherwise. F.R.C.P. 34(b).

7. Interrogatory No. 9: Requested information is discoverable only for the Department of Residential Life for the period following the assignment to that department of the new supervisor whom plaintiff alleges adversely evaluated his performance. Defendants are only required to make

these documents available for inspection and copying and are not required to copy these for plaintiff, unless the parties agree otherwise. F.R.C.P. 34(b).

IT IS FURTHER ORDERED that the answers to the interrogatories and the documents shall be produced **within twenty (20) days** from the date of this order or, if this order is appealed to the presiding judge, from the date of any decision by the presiding judge affirming this order.

Baton Rouge, Louisiana this 9th day of January, 1998.

/s/ Docia L. Dalby
MAGISTRATE JUDGE
DOCIA L. DALBY

Supreme Court, U.S.
FILED
MAR 30 1999
OFFICE OF THE CLERK

No. 98-1409

In The

Supreme Court of the United States

October Term, 1998

OLIN T.C. DAWSON,

Petitioner,

v.

LOUISIANA STATE UNIVERSITY, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

Table Of Contents i

Table Of Authorities iii

Cases iii

Statutes iii

Rules iv

Statement Of The Case 1

Facts 1

Procedural History 4

Summary Of Argument 5

A. Summary Judgment Was Properly Granted Regarding Petitioner's Termination Claim 5

B. Petitioner Failed To Preserve His Discovery Objection 5

C. Petitioner Failed To Properly Assert A Due Process Claim 6

Argument 6

The Termination Claim 6

A. Petitioner Cannot Establish A Prima Facie Case 7

B. Respondent Had Non-Discriminatory Reasons For Terminating Petitioner 7

C. Petitioner Cannot Bear His Ultimate Burden Of Proof 9

The Appropriate Scope Of Discovery 10

Petitioner's Due Process Argument 11

TABLE OF CONTENTS – Continued

Page

A. Petitioner Never Properly Raised The Issue In The Trial Court 11

B. Petitioner Did Not Have A Constitutionally Protected Property Right In His Continued Employment 12

C. Petitioner Was Accorded Due Process 13

Other Claims 14

A. The Associate Director Claim 15

B. The Assistant Director Claim 16

C. The Claim Of Retaliation 16

Conclusion 17

TABLE OF AUTHORITIES

Page

CASES

Board of Regents v. Roth, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972) 12

Cabrol v. Town of Youngsville, 106 F.3d 101 (5th Cir. 1997) 13

Cleveland Board of Education v. Loudermill, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985) ...12, 14

Davis v. Chevron, U.S.A., 14 F.3d 1082 (5th Cir. 1994) 9

Jackson v. Widnall, 99 F.3d 710 (5th Cir. 1996) 11, 12

Marshall v. Westinghouse Electric Corp., 576 F.2d 588 (5th Cir. 1978) 11

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) 9

St. Mary's Honor Center v. Hicks, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993) 7, 9

Singletary v. B.R.X., Inc., 828 F.2d 1135 (5th Cir. 1987) 10

Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981) 8, 9

STATUTES

Fourteenth Amendment to the United States Constitution 11, 12, 14

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C. § 2000e *et seq.* 4

Louisiana Civil Code article 2747 13

RULES

Federal Rules of Civil Procedure

Rule 72(a) 6, 10

Local Rules for the Middle District of Louisiana
Rule 74.1 .....6, 10

Rule 14(1)(a) of the Rules of the Supreme Court of the United States 15

STATEMENT OF THE CASE

A. Facts

Respondent, the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College ("LSU") hired the petitioner, Olin "Cecil" Dawson ("Petitioner"), a black male, on October 1, 1980 (Dawson depo. at 21).[1] From 1981 to 1994, Petitioner served as an Area Coordinator in LSU's Department of Residential Life (Dawson depo. at 22).

As early as 1990, Petitioner's supervisors began noting that he was experiencing personal problems that affected his job performance. His 1990 evaluation stated that "personal frustrations have created apprehensions within the staff." The evaluation also noted:

> Some personal frustrations have festered into outspoken comments approaching a loss of temper. This is proving disruptive to staff relationships and produces a negative tone in staff meetings.

(Dawson depo. at 304-06, Dawson depo. exhibit 23).

In 1993, Doris Collins, Director of Residential Life, initiated an external review of the department. The review was conducted by two independent consultants.

---

[1] Petitioner's uncondensed deposition was attached to and offered into evidence with Respondent's motion for summary judgment. It is contained in three bound volumes separate from the rest of the record on appeal, and has not been consecutively numbered as has the rest of the appellate record. Accordingly, when referring to the deposition, LSU will cite directly to the transcript page number, rather than to a record page number.

Collins' goal was to increase the department's efficiency while reducing its administrative costs. In early 1994, Collins began reorganizing the department based on the consultants' recommendations (rec. at 212-13).

As part of the reorganization, a new position, Associate Director, was created. The person holding this position would be the "second-in-command" in the department. Seven applicants, including Dawson, were interviewed. Debora Baker, a white female, was hired to fill the new position in March, 1994. Baker had previously been responsible for the day-to-day operation of the housing department at the University of Oklahoma. Baker became Petitioner's immediate supervisor (rec. at 214, 241-42).

As part of the same reorganization, the four Area Coordinator positions, including Petitioner's, were eliminated and replaced by two new Assistant Director positions. Dawson was hired to fill one of the new positions. These new positions involved more duties and responsibilities than did the old Area Coordinator positions, and Dawson therefore received a substantial pay increase (rec. at 215; Dawson depo. at 90-98).

Throughout the summer of 1994, Petitioner was involved in a series of disciplinary and administrative incidents of escalating seriousness and frequency. He missed meetings and fell asleep or appeared drowsy in others; failed to perform assigned tasks; and lost his temper and became openly hostile towards Baker on several occasions. Most disturbingly, in a conversation with the Assistant to the Chancellor, Petitioner admits that he angrily referred to Residential Life as a "rathole" and

said "something needs to be done before somebody blows the whole messed-up area off the map" (rec. at 216, 233-37, 240, 242-44, 249-58; Dawson depo. at 235-42).[2]

Forest Benedict, Associate Chancellor for Human Resource Management, learned of Dawson's poor job performance and threatening and irrational behavior from representatives of Residential Life. Benedict investigated these reports and concluded that Petitioner might pose a threat to himself and/or others. Accordingly, by letter dated September 15, 1994, Benedict notified Dawson that he was being placed on administrative leave and was not to return to campus. The letter stated that Respondent was considering whether to terminate Dawson's employment and invited him to provide reasons why such action should not be taken (rec. at 259-63).

By letter dated December 7, 1994, Benedict notified Petitioner that although Respondent felt that Dawson's conduct justified his termination, the University would be willing to consider returning him to employment in a different department. The letter also invited Petitioner to schedule a meeting to discuss alternatives and advised him that he could have legal counsel present at that meeting if he chose (rec. at 260, 267).

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[2] Respondent contends that in that same meeting, and again the next day in a meeting with the Chancellor, Dawson threatened to kill Debora Baker. LSU further contends Dawson emphasized that he was a Vietnam veteran and had been trained to kill. Dawson denies these other contentions, and for purposes of summary judgment only, Respondent accepts his version of events as true.

Petitioner never scheduled a meeting; did not make any effort to meet with Benedict to discuss alternative employment opportunities with Respondent; and never gave any reasons why LSU should not terminate his employment. Accordingly, by letter dated March 8, 1995, Benedict notified Petitioner that he was terminated (rec. at 260.5).

2. Procedural History

Petitioner filed this lawsuit in June, 1995, in the United States District Court for the Middle District of Louisiana. Petitioner alleges that LSU unlawfully discriminated against him on the basis of his race, in violation of 42 U.S.C. § 2000e (rec. at 562).

On March 7, 1997, Petitioner filed a motion to compel seeking statistical data from the entire University (rec. at 410-16). Respondent had previously provided that information as to the Department of Residential Life, but objected to any further production.

On January 12, 1998, Respondent filed a motion for summary judgment as to all claims.

On January 9, 1998, United States Magistrate Judge Docia Dalby ruled on Petitioner's motion to compel. The magistrate judge agreed with LSU and limited discovery to the Department of Residential Life (rec. at 271-74). Petitioner did not appeal that ruling to the district court.

On February 13, 1998, Magistrate Judge Dalby recommended that the district court grant Respondent's motion for summary judgment (rec. at 45-52). On June 8, 1998, the district court granted LSU's motion for summary

judgment for the reasons set forth in the magistrate judge's report (rec. at 4). Final judgment was signed that same date (rec. at 3).

The United States Court of Appeals for the Fifth Circuit affirmed the decision per curiam on December 4, 1998.

SUMMARY OF ARGUMENT

A. Summary Judgment Was Properly Granted Regarding Petitioner's Termination Claim

The district court and court of appeals properly concluded that there were no genuine issues of material fact regarding Petitioner's termination. Dawson cannot establish a prima facie case of discrimination in connection with his termination claim because, *as he admits in his petition,* a black male was hired as his permanent replacement. Furthermore, Dawson's only evidence that the decision to terminate him was a pretext for unlawful discrimination is his own uncorroborated, self-serving, conclusory testimony. This is insufficient as a matter of law to carry his ultimate burden of proof. Furthermore, Petitioner cannot refute Respondent's legitimate, nondiscriminatory reasons for its decision.

B. Petitioner Failed To Preserve His Discovery Objection

Petitioner challenges the scope of discovery established by the magistrate judge. However, he failed to appeal the magistrate judge's ruling to the district court

as provided for by Rule 72(a) of the Federal Rules of Civil Procedure and Rule 74.1 of the Local Rules for the Middle District of Louisiana. Therefore, as the Fifth Circuit expressly held, Petitioner cannot raise this issue on appeal or in his petition to this Court.

C. Petitioner Failed To Properly Assert A Due Process Claim

Dawson failed to raise his due process argument properly in the district court, as expressly noted by the magistrate judge. Alternatively, even if the claim was properly asserted, Petitioner did not have a constitutionally protected property interest in continued employment. Finally, even though not required to do so, LSU accorded Dawson full due process in connection with his termination.

ARGUMENT

THE TERMINATION CLAIM

Petitioner claims the district court and court of appeals erred when they granted Respondent's motion for summary judgment and dismissed the case. Respondent submits that Petitioner's claim is without merit and that his own petition illustrates that he cannot establish a prima facie case of discrimination or bear his ultimate burden of proof. Therefore, Petitioner is not entitled to review by this Court.

A. Petitioner Cannot Establish A Prima Facie Case Of Race-Based Discrimination

As has been well established by this Court, to maintain a prima facie case of discrimination in a termination case, a plaintiff must show: (1) that he is a member of a protected class, (2) that he was qualified for the position he held, (3) that he was discharged, and (4) that after his discharge, the position he formerly held was filled by someone outside the protected class. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993).

Petitioner cannot establish a prima facie case of discrimination because, as he admits in his own petition, a black male was hired as his permanent replacement (pet. at 9). Furthermore, it is clear that Petitioner's poor job performance and irrational behavior made him unqualified for his position. As a matter of law, Petitioner cannot establish a prima facie case of discrimination.

B. Respondent Had Non-Discriminatory Reasons For Terminating Petitioner

As early as 1990, but particularly during 1994, Petitioner was involved in a series of disciplinary and administrative incidents of escalating seriousness and frequency. These incidents included both behavioral and administrative problems with Dawson's job performance: (1) multiple complaints of Petitioner becoming angry with and directing profanity towards his co-workers, student workers, and dormitory house council members, (2) several instances in which Petitioner was openly insubordinate, angry, and profane with his immediate supervisor,

Debora Baker, (3) numerous complaints of Petitioner missing meetings and training sessions, (4) reports of Petitioner appearing drowsy during meetings and sleeping through others, and (5) occasions when Petitioner failed to carry out specific tasks for which he was responsible. These incidents culminated with Petitioner admittedly telling the Assistant to the Chancellor that Residential Life was a "rathole" and that "something needs to be done before somebody blows the whole messed-up area off the map".[3]

Petitioner disputes whether some of these events ever occurred. But Respondent discharges its burden of articulating non-discriminatory reasons for its action simply by producing evidence that these incidents were reported to the decision-makers. It is immaterial whether Dawson believes a factual issue exists as to Respondent's numerous proffered reasons. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981). He still must show that the decisions were motivated by race or retaliation. This, he cannot do.

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[3] LSU contends that Dawson actually threatened to kill Debora Baker. *See supra* note 1. For purposes of summary judgment only, LSU accepts Dawson's more limited version of events as true. It is uncontroverted, however, that this was the *reported* content of Dawson's statements, and that these reports were known to those who made the decision to terminate Dawson's employment.

C. Petitioner Cannot Bear His Ultimate Burden Of Proof

Once an employer has articulated a non-discriminatory reason for its conduct, which LSU has done, the burden shifts to the appellant to show that the proffered reasons are pretextual. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). This requires a showing "both that the reason was false, and that discrimination was the real reason." *St. Mary's Honor Center*, 509 U.S. at 515, 113 S. Ct. at 2752. Whatever evidence the claimant tenders must rebut each of the employer's proffered rationales. *Burdine*, 450 U.S. at 256.

Petitioner has offered no evidence to rebut LSU's non-discriminatory reasons for his discharge. In fact, he **admits** that he resented Ms. Baker, his supervisor; that he had trouble getting along with co-workers and students; that he missed meetings; and that he made the threatening statements to the Assistant to the Chancellor.

Furthermore, even though Petitioner disputes certain events, he offers no evidence in support of his contentions, but only his own self-serving conjecture. Respondent has proffered legitimate non-discriminatory reasons for discharging Petitioner and has supported them with uncontroverted documentary evidence. Petitioner's only response is to continue to insist he was discriminated against. *He cannot point to a single specific fact in support of his ultimate burden of proof.* This is simply insufficient to withstand summary judgment. *See Davis v. Chevron, U.S.A.*, 14 F.3d 1082, 1088 (5th Cir. 1994).

Dawson's petition for writ of certiorari on this claim should be denied.

THE APPROPRIATE SCOPE OF DISCOVERY

Petitioner propounded written discovery requests seeking statistical data regarding the entire LSU system. Respondent provided Dawson with the requested information with regard to the Department of Residential Life, but objected to the requests to the extent they sought information outside that department. Seventeen months later, Petitioner filed a motion to compel the production of university-wide information. Magistrate Judge Dalby ruled that Dawson was entitled only to statistical information regarding his department.

Petitioner contends on appeal that the magistrate judge improperly limited the scope of discovery. However, he never appealed the ruling to the district court as provided for by Rule 72(a) of the Federal Rules of Civil Procedure and Rule 74.1 of the Local Rules for the Middle District of Louisiana. Instead, he raised the issue for the first time on appeal to the Fifth Circuit Court of Appeals.

As expressly noted by the Fifth Circuit, because Petitioner did not appeal the ruling to the district court, he cannot raise the issue on appeal or in this petition (Opinion at 2) (per curiam). *See also Singletary v. B.R.X., Inc.*, 828 F.2d 1135, 1137 (5th Cir. 1987) ("[P]retrial matters referred by a trial judge to a magistrate must be appealed first to the district court.").

Furthermore, it is clear that the factual basis for Petitioner's claims is confined to the Department of Residential Life and the actions of Doris Collins, the Director of the department, and Debora Baker, the Associate Director of the department. Accordingly, the decision to

limit discovery was proper. *See Marshall v. Westinghouse Electric Corp.*, 576 F.2d 588, 592 (5th Cir. 1978):

> [I]n the context of investigating an individual complaint the most natural focus is upon the source of the complained of discrimination – the employing unit or work unit. To move beyond that focus the plaintiff . . . must show a more particularized need and relevance.

Dawson's petition for writ of certiorari on this issue should be denied.

PETITIONER'S DUE PROCESS ARGUMENT

Petitioner argues that the trial court erred in granting summary judgment because there exist genuine issues of material fact regarding whether he was accorded due process under the Fourteenth Amendment to the United States Constitution.

Respondent's reply is three-fold. First, Petitioner improperly raised this issue for the first time on appeal. Second, as an at-will employee under Louisiana law, Dawson did not have a constitutionally protected property right in his continued employment. Third, Petitioner was accorded due process, even though he was not entitled to it.

A. Petitioner Never Properly Raised The Issue In The Trial Court

Allegations of constitutional violations must be pled with factual detail and particularity. *Jackson v. Widnall*, 99 F.3d 710, 714 (5th Cir. 1996). Constitutional claims not

raised in the district court are deemed waived and may not be asserted for the first time on appeal. *Id.* at n.9.

Dawson did not plead a due process violation in the district court *at all*, much less with factual detail and particularity. Nor did he raise the issue in his one-page opposition to Respondent's motion for summary judgment. Consequently, the district court found in its reasons for summary judgment that Petitioner had only asserted claims for unlawful discrimination (rec. at 46).

Because Petitioner failed to properly raise the due process issue in the district court, he cannot raise it now before this Court.

B. Petitioner Did Not Have A Constitutionally Protected Property Right In His Continued Employment

Even if his due process argument is properly before the Court, Petitioner does not have a constitutionally protected property right in his continued employment.

The Fourteenth Amendment's Due Process Clause does not create a property interest in government employment. *Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972). Instead, constitutionally protected property interests derive from independent sources, such as contract or state law. *See, e.g., Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985). Absent a property interest, there is no interest subject to due process protection and the inquiry ends.

Without a contractual agreement for employment for a specified term or a legislative or regulatory restraint on a public entity's termination authority, Louisiana law does not establish a right to continued employment. *See* La. Civ. Code art. 2747. *See also Cabrol v. Town of Youngsville*, 106 F.3d 101 (5th Cir. 1997).

Petitioner was not a civil service employee and was, in fact, an unclassified, "at-will" employee. He did not have a contract for a specified term of employment, and he has not pointed to any legislative or regulatory restraint on Respondent's ability to terminate him. Under Louisiana law, he had no constitutionally protected property right in continued employment with LSU. Accordingly, the Due Process Clause affords Dawson no protection.

C. Petitioner Was Accorded Due Process

Notwithstanding that Petitioner had no property interest in his job, Respondent accorded him due process prior to his termination.

In his letter of September 15, 1994, Forest Benedict, Associate Chancellor for Human Resource Management, notified Petitioner that he was being placed on administrative leave and was not to return to campus. Benedict also told Dawson that the University was considering terminating his employment, and requested that Petitioner provide reasons why the University should not do so. Dawson did not respond to Benedict's letter.

In a subsequent letter, Benedict informed Petitioner that although Respondent felt his job performance and

conduct justified his termination, the University would consider returning Dawson to employment in a different department. The letter also asked Petitioner to schedule a meeting to discuss such an alternative. Benedict also advised Dawson that he could have legal counsel present at that meeting if he chose. Petitioner never scheduled a meeting nor made any effort to meet with Benedict to discuss alternative employment opportunities or any justification for his behavior.

Respondent subsequently terminated Dawson's employment.

The Fourteenth Amendment does not require a formal hearing, but only that the claimant be given reasonable notice and an opportunity to be heard. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1979). Respondent provided such notice and opportunity to Dawson, and he is therefore not entitled to review on this claim.

OTHER CLAIMS

In the "Reasons For Granting The Writ" section of his petition, Petitioner refers to other distinct claims. He claims Respondent discriminated against him by not promoting him to the new Associate Director position (pet. at 15). He also claims the old Area Coordinator and new Assistant Director positions were one and the same, and that he was unlawfully required because of his race to reapply for a position he already held (pet. at 16). Finally, he claims Respondent unlawfully retaliated against him for writing a letter to the Attorney General of the United States (pet. at 13-15).

Petitioner did not list these additional claims in the "Questions Presented" section of his petition, and thus, under Rule 14(1)(a) of the Rules of the Supreme Court of the United States, they are not before the Court. Respondent objects to Petitioner's inclusion of these additional claims, but will nevertheless briefly address them.

A. The Associate Director Claim

Petitioner claims LSU discriminated against him by hiring Debora Baker for the new Associate Director position, rather than promoting him. The magistrate judge's report, which was adopted by the district court, expressly rejected this claim:

> In order to establish a prima facie case of race discrimination on a non-promotion claim, [Petitioner] must prove, as one of the essential elements of his claim, that he was qualified for the position in question. . . . [Petitioner] has not done so here.

(rec. at 45-52).

The Fifth Circuit affirmed:

> [W]e conclude that summary judgment was appropriate, essentially for the reasons stated in the magistrate judge's report and recommendation, which was adopted by the district court.

(Opinion at 2) (per curiam).

B. The Assistant Director Claim

Petitioner claims that the old Area Coordinator and new Assistant Director positions were one and the same, and that Respondent unlawfully harassed and discriminated against him by requiring him to reapply for a position he already held. LSU demonstrated, however, that the second Assistant Director position was filled with a white male who, like Petitioner, had previously been an Area Coordinator. In other words, Petitioner received precisely the same treatment as a white person. The magistrate judge's report, which was adopted by the district court, expressly rejected this claim:

> Dawson admits in his deposition that [a white male] also was required to apply for the position. . . . [Petitioner] still must come forward with specific facts showing that similarly situated persons outside the class (i.e., whites) were treated more favorably. [Petitioner] has come forward with no such proof here.

(rec. at 45-52).

As previously noted, the Fifth Circuit affirmed the decision.

A. The Claim Of Retaliation

Petitioner claims that Respondent retaliated against him after he wrote a letter directly to the Attorney General of the United States. The magistrate judge's report, which was adopted by the district court, stated that Dawson did not properly raise any claims other than those for unlawful discrimination:

> The legal memoranda discuss the possible presence of other possible claims. But the complaint, even when read with the fullest liberality, does not assert any claims other than those described above. It of course is the complaint filed in this matter that controls the scope of these proceedings.

(rec. at 45-52 n.4).

The Fifth Circuit affirmed the decision.

CONCLUSION

Petitioner's application for writ of certiorari should be denied because Respondent's motion for summary judgment was properly granted and affirmed on appeal. Petitioner cannot establish a prima facie case of or bear his ultimate burden of proving discrimination. The district court properly limited the scope of discovery, and that issue is not before this Court because Dawson failed to challenge the ruling timely. Finally, Petitioner's due process claim is not properly before the Court, and Dawson was accorded due process. Therefore, Petitioner's request for writ of certiorari should be denied.

Respectfully submitted,

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